IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.114/CTK/2022
Assessment Year : 2017-18

M/s. Bhagabati Build & Constructions Pvt Ltd., At: Madhupatna, PO: Link Road, PS:Madhupatna, Cuttack	Vs.	Pr. CIT, Bhubaneswar-1
PAN/GIR No.AAECB 1801 D		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Sandeep Kumar Jena, AR
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 28/02/2023
Date of Pronouncement : 28/02/2023

O R D E R

Per Bench

This is an appeal filed by the assessee against the order of the ld Pr. CIT, Bhubaneswar-1 dated 27.11.2019 in Appeal No.ITBA/AST/S/144/2019-20/1021143134(1) for the assessment year2017-18.

2. Shri Sandeep Kumar Jena, ld AR appeared for the assessee and Shri M.K.Gautam ,ld CIT DR appeared for the revenue.

3. The appeal is time barred by 24 days. The assessee has filed condonation petition, duly notorised stating that the appeal could not be

filed due to illness of the accountant. Since, the delay is for short period, it was submitted that the delay may be condoned. Ld CIT DR did not have any objection. Consequently, we condone the delay of 24 days and admit the appeal for hearing.

3. Ld AR has filed written submission as follows:

> "1. That basically the ld Pr.CIT -1 initiated the proceeding under section 263 on 1.6.2021 by leveled the assessment order as erroneous and in so far as prejudicial to the interest of the revenue for the self satisfy reasons at page-2 para 3.3 & 3.6 of the order dated 24.3.2002 u/s.263 as below:
>
> i) That the ld AO is erred in law by estimating the profit @ 8%. As such the estimation covers all expenses, therefore, the AO has committed error by allowing depreciation to the appellant over and above the estimated profit.
> ii) It has also been pointed out by the ld Pr. CIT that the AO is erred in issuing refund of Rs.2,60,105/- whereas the assessment is completed u/s.144 of the Act.
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> 2. That the appellant most respectfully makes the following:
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> i) That the impugned order u/s.263 has been passed by the Pr. CIT on 24.3.2022 without waiting for the outcome of another appeal filed by the appellant bearing ITA No.57/CTK/2021 relating to the preceding assessment year i.e. 2016-17, in which the same issue of depreciation allowance over and above the estimated profit was pending for adjudication before this Hon'ble ITAT. That finally the parallel coordinate Bench of this Hon'ble Bench just after four days i.e. on 29.3.2023 have been pleased to dispose of the aforesaid appeal by quashing the order passed u/s.263 of the Act by the same PCIT. The copy of the order has already been submitted on 14.2.3023 before this Hon'ble Bench; please see at para -17 of the order. Therefore, the issue as regards to depreciation is squarely covered by the order supra.
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> That so far as the issue as regards to issuance of refund amounting to Rs.2,60,105/- to the appellant, arising from the order of assessment completed uls.l44 of the Act is concerned, it is submitted that assessment u/s. 144 of the Act is an assessment carried out as

per the best judgment of the Assessing Officer on the basis of all relevant material he has gathered. In this case the Ld. AO passed the assessment order in terms of section 144 of the Act, by enhancing the profit percentage from 4.0lYo (after depreciation) to 8%o (before depreciation) which is at much higher side to the return income. Further in the return of income filed by the appellant an amount of Rs.6,69,6601 had been claimed as refund which is excess payment of tax by way of TDS from the appellant. In the assessment order the refund has been reduced substantially to Rs.2,60,105/- i,e almost 1/3'd of the claim by the appellant. The copy of the ITR with computation of income is enclosed herewith. Therefore the order is neither erroneous nor prejudicial to the interest of revenue, rather is beneficial to the interest of revenue due to substantial reduction of refund. Therefore the Ld. Pr. CIT wrongly implied that no refund can be granted uls.144 of the Act. That under the above factual matrix the assessment order passed u/s. 144 of the Act cannot be leveled as erroneous and prejudicial to the interest of revenue and the Ld. Pr. C.I.T, go beyond his revision jurisdiction by setting aside the assessment order on fantasy grounds, which is completely diverted from the spirit of Sec. 263 of the Act. Therefore in consideration of this submission, the impugned revision order passed uls.263 of the Act is unsustainable under law, hence deserved to be quashed."

4. It was submitted by ld AR that the assessee had filed its return of income and assessment was completed u/s.144 of the Act, where the total income of the assessee had been estimated. The Pr. CIT had invoked his powers u/s.263 of the Act on the ground that the order of the AO was erroneous and prejudicial to the interest of the revenue insofar as the Assessing Officer had estimated the income of the assessee at 8% and then granted depreciation as permissible. The second issue raised was that the assessee had been granted refund of the excess tax paid even though the assessment had been completed u/s.144 of the Act. It was the submission that the first issue being the allowance of depreciation when the income of the assessee has been estimated was squarely covered by the Co-ordinate

Bench of this Tribunal in assessee's own case in ITA No.57/CTK/2021 order dated 29.3.2022, wherein, in paras 16 & 17, it has been held as follows:

> "16. In view of above written submission of the assessee, we observe that the Hon'ble Supreme Court in the case of Awasthi Traders (supra) has held thus:
> "that admittedly, the proviso to section 44AD of the Income-tax Act, 1961, was applicable to the assessee in view of the fact that its income for the assessment year in question, i.e., 2009-10, was above &#8377 40 lakhs and therefore, the bar to the entitlement for depreciation under section 44A(2) of the Act would not apply. Grant of depreciation under section 32 of the Act would, therefore, become mandatory. However, if on verification, it was found that the income of the assessee was less than Rs. 40 lakhs and, therefore, the proviso to section 44AD of the Act had application, the Department may seek modification of the Court's order."
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> 17. The above preposition rendered by Hon'ble Supreme Court has been followed by Co-ordinate Benches of the Tribunal. Therefore, in view of judgment of Hon'ble Supreme Court in the case of Awasthi Traders (supra), the income of the assessee for the relevant assessment year 2016-17 was above the prescribed limit of Rs.1 crore, therefore, the bar to the entitlement for depreciation under section 44A(2) of the Act would not apply and grant of depreciation under section 32 of the Act would become mandatory. In the present case, there is no dispute that the gross receipts/turnover of the assessee from civil construction work was more than Rs.1 crore and the AO estimated the net profit @ 8% keeping in view the percentage provided in section 44AD of the Act, but said provision neither applied by the AO nor applicable to the case of the assessee. Therefore, in view of judgment in the case of Awasthi Traders (supra), and other judgments of Co-ordinate Benches of the Tribunal, the bar to the entitlement for depreciation u/s.44AD of the Act would not apply to the present case. Respectfully following the judgment of Hon'ble Supreme Court in the case of Awasthi Traders (supra), we hold that the AO was right in allowing depreciation after estimating the net profit at 8% of gross receipts of the assessee without applying the provisions of section 44AD of the Act as the total turnover was more than Rs.1 crore. Therefore, we decline to accept the contention of Pr. CIT that the order of the AO is erroneous and prejudicial to the interest of the revenue on account of allowance of depreciation to the assessee

> after estimating the net profit @ 8% on the gross receipts. Therefore, in view of foregoing discussion, we hold that the assessment order cannot be alleged as erroneous and prejudicial to the interest of the revenue. Therefore, the impugned revisionary order u/s.263 of the Act cannot be held as sustainable and thus, we quash the same by allowing the ground of appeal of the assessee."

5. In regard to second issue, it was the submission that the taxes having been paid in excess, consequently, the assessee was entitled to refund. It was the submission that the assessment has been done and in the assessment refund has become due. It was the submission that consequently, there was no error in the order of the Assessing Officer, which calls for any revision u/s.263 of the Act.

6. In reply, ld CITA DR vehemently supported the order of the Pr. CIT. It was the submission that in regard to issuance of refund, the assessment having been completed u/s.144 of the Act being the best judgment assessment, the provisions provided for determination of sum payable by the assessee on the basis of such assessment. It was the submission that the word " or refundable to the assessee" had been omitted w.e.f 1.4.1988 by the Direct Tax Laws (Amendment) Act, 1987. It was the submission that w.e.f 1.4.1988, when assessment has been done u/s.144, obviously, no refund can be granted to the assessee. It was the submission that the order u/s.263 of the Act was valid and the assessment order itself contains substantial error insofar as prejudicial to the interest of the revenue. It was the prayer that the order passed u/s.263 of the Act be upheld.

7. It is also the submission that in regard to the issue of real estate business, which had shown high closing balance and the same was the reason for the scrutiny assessment in the case of the assessee but the AO had not raised question on the same. It was the submission that the Pr. CIT in his order u/s.263 of the Act has raised the issue for adjudication and consequently, same is liable to be considered and the issue can be considered for revision u/s.263 of the Act. It was the further submission that even interest income of Rs.35,39,712/- had been left out when completing the assessment and this itself showed the order u/s.144 of the Act was erroneous and prejudicial to the interest of the revenue.

8. We have considered the rival submissions. At the outset, the issue as to whether the real estate business with high closing balance was considered by the AO or whether the interest income of Rs.35,39,712/- was liable to be brought to tax are not the issues, raised in the show cause notice u/s.263 of the Act. These are the issues, which are not in the realm of consideration in respect of appeal before the Tribunal. The appeal before the Tribunal is against the order passed u/s.263 of the Act. The issues are restricted before the Tribunal to the issues raised in 263 notice. In the order u/s.263 of the Act, two issues have been raised, first being whether the depreciation can be granted when the income of the assessee is estimated at 8%. This issue admittedly is squarely covered by the decision of the Co-ordinate Bench in assessee's own case for the

assessment year 2016-17 referred supra. Consequently, the order u/s.263 on this issue has become unsustainable and same would stand quashed.

9. The second issue raised in the order u/s.263 of the Act is whether refund can be granted in best judgment assessment passed u/s.144 of the Act. Here one would very well refer to the order of the Pr. CIT in para 3.7 when he has taken presumption that the Assessing Officer is suppose to protect the interests of revenue as a tax collector. The assessing Officer is not a tax collector *perse* he is a tax assessor. He is to assess the correct income of the assessee and levy the tax in accordance with law. An order whether it is passed u/s.143(3) or u/s.144 of the Act retains the character of an assessment order. Just because the word "or refundable to the assessee" have been deleted from the provisions of section 144(1) cannot be interpreted to hold that if an assessment is done u/s.144, no refund can be granted to the assessee. Under the Income tax Act, what is expected to be collected is the correct tax. What is being proposed by the pr. CIT is nothing but highway robbery. Nothing would stop the Assessing Officer from passing the order u/s.144 of the Act for even one default in complying with the notice and that would end up with forfeiture of the refund due to the assessee if the interpretation as proposed by the Pr. CIT is accepted. This is not what is expected under the Income tax Act. This being so, we find that the order passed by the Pr. CIT is unsustainable and consequently, the order passed u/s.263 stands quashed.

10. In the result, appeal of the assessee stands allowed.

Order dictated and pronounced in the open court on 28/02/2023.

(Arun Khodpia)
ACCOUNTANT MEMBER

(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 28/02/2023
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : M/s. Bhagabati Build & Constructions Pvt Ltd., At: Madhupatna, PO: Link Road, PS:Madhupatna, Cuttack
2. The Respondent: Pr. CIT, Bhubaneswar-1
3. The CIT(A)-1, Bhubaneswar
4. DR, ITAT, Cuttack
5. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack